Halim bin Arsyat v Sistem Televisyen Malaysia Bhd & Ors

HIGH COURT (KUALA LUMPUR) — SUIT NO S2–23–35 OF 1998
KAMALANATHAN RATNAM J
2 JULY 2001

***Tort** — Defamation — News bulletin — Broadcast concerning secretary general of political party and permit holder of newspaper — Burden on plaintiff to show he was person identified by words complained of — Whether permit holder had automatic right to claim defamation — Defence of qualified privilege — Test applicable — Defence to be defeated by proof of express malice — What amounted to plea of express malice*

The plaintiff was at the material time the Secretary General of the Islamic Party of Malaysia ('PAS'). He was also the permit holder of a PAS's newspaper known as *Harakah*. By the amended statement of claim, the plaintiff claimed that the defendants falsely and maliciously broadcast or caused to be broadcast of and concerning him as the then Secretary General of PAS and the permit holder of *Harakah*, the words complained of in the said *Buletin Utama* which were defamatory of him and that the words viewed in the context of the said telecast were understood to refer to him. The plaintiff, thus, claimed damages in the sum of RM20m against each of the defendants with interest and costs and a further order to direct the defendants to tender their apologies by broadcasting the same in the *Buletin Utama* for three days consecutively. In their defence, the defendants denied that the words in the said *Buletin Utama* either referred to the plaintiff or bore the meanings respectively as alleged by the plaintiff.

Held, dismissing the claim with costs:

(1) The burden remains on the plaintiff to show that the words complained of refer to him. It is for the plaintiff to establish objectively that he was the person to be identified by the words used. The plaintiff had failed to identify himself as the person concerned as his case was based on no more than the spectre of a mere possibility raised in answer to what the court found as a leading question. No evidence had been adduced that any reasonable person other than interested witnesses of the plaintiff himself on watching the show and hearing the words broadcast would on rational grounds have identified the said words with the plaintiff. The plaintiff's case, that as he was the permit holder of *Harakah*, this itself conferred on him the automatic right to claim to have been defamed by any defamation directed at the said publication, has no support both in law and in logic (see pp 361E, 362D, F); *Morgan v Odhams Press Ltd & Anor* [1971] 2 All ER 1156, *Knupffer v London Express Newspaper Ltd* [1944] AC 116 and *Australian Newspaper Co Ltd v Bennett* [1894] AC 284

followed and *Sandison v Malayan Times Ltd & Ors* [1964] 30 MLJ 332 distinguished.

(2) The purpose of the defence of qualified privilege is to prevent liability from arising for untrue statements that may have been made on protected occasions since the defence of justification already protects true statements. For the defence of qualified privilege to apply, the defendants must be under a duty to speak and the public under a corresponding interest to hear what was said. The plaintiff's witnesses all admitted in their evidence that what was said were matters of public interest. In any case, this was clearly a case where the circumstantial test can well apply (see pp 365I–366A, F–G); *Reynolds v Times Newspapers Ltd* [1998] 3 WLR 863 followed.

(3) Once this defence is made out, it could be defeated only by proof of express malice by virtue of O 78 r 3(3) of the Rules of the High Court 1980. Express malice must be pleaded in a reply and that particulars must be set out. Unfortunately, there was no reply filed by the plaintiff nor were there allegations of express malice. In any case, no evidence was even presented by the plaintiff on express malice. The reference in para 8 of the amended statement of claim to the words that the defendants published the words 'falsely and maliciously' was not a plea of express malice. Such allegations were meant to make out the plaintiff's case. Thus, such words 'falsely and maliciously' as pleaded, did not make out a plea of express malice to negate the defence of qualified privilege (see pp 366G–H, 367A–C).

[Bahasa Malaysia summary

Plaintif pada setiap masa matan adalah Ketua Setiausaha Parti Islam Malaysia ('PAS'). Beliau juga pemegang permit akhbar PAS yang dikenali sebagai *Harakah*. Melalui penyataan tuntutan terpinda, plaintif menuntut bahawa defendan-defendan telah dengan salah dan niat jahat menyiarkan atau menyebabkan disiarkan berhubung dan tentang beliau yang ketika itu Ketua Setiausaha PAS dan pemegang permit *Harakah*, perkataan-perkataan yang diadukan dalam *Buletin Utama* tersebut yang memfitnah beliau dan bahawa perkataan-perkataan tersebut jika dilihat dalam konteks siaran televisyen tersebut difahami sebagai merujuk kepada beliau. Plaintif, oleh itu, menuntut ganti rugi berjumlah RM20j terhadap setiap defendan-defendan berserta faedah dan kos dan satu perintah selanjutnya mengarahkan defendan-defendan memohon maaf dengan menyiarkan yang sama dalam *Buletin Utama* untuk tiga hari berturut-turut. Dalam pembelaan mereka, defendan-defendan tersebut telah menafikan bahawa perkataan-perkataan dalam *Buletin Utama* tersebut sama ada merujuk kepada plaintif atau membawa maksud-maksud masing-masing yang didakwa oleh plaintif.

Diputuskan, menolak tuntutan tersebut dengan kos:

(1) Beban masih kekal di atas plaintif untuk menunjukkan bahawa perkataan-perkataan yang diadukan merujuk kepada beliau. Adalah untuk plaintif membuktikan secara objektif bahawa beliau merupakan orang yang dikaitkan dengan perkataan-perkataan yang digunakan. Plaintif telah gagal untuk membuktikan diri beliau sebagai orang yang berkaitan kerana kes beliau berdasarkan tidak lebih daripada hanya satu bayangan kemungkinan yang ditimbulkan sebagai jawapan kepada apa yang mahkamah dapati sebagai satu soalan pimpin. Tiada keterangan telah dikemukakan di mana sesiapa yang waras selain saksi-saksi plaintif sendiri yang berkepentingan dengan menonton siaran tersebut dan mendengar perkataan-perkataan yang disiarkan akan atas alasan-alasan yang rasional mengaitkan perkataan-perkataan tersebut dengan plaintif. Kes plaintif bahawa, oleh kerana beliau adalah pemegang permit *Harakah*, ini dengan sendirinya memberikan beliau hak serta-merta untuk menuntut bahawa telah difitnahkan oleh mana-mana fitnah yang ditujukan kepada penerbitan tersebut, tidak disokong oleh kedua-dua undang-undang dan logik (lihat ms pp 361E, 362D, F); *Morgan v Odhams Press Ltd & Anor* [1971] 2 All ER 1156, *Knupffer v London Express Newspaper Ltd* [1944] AC 116 dan *Australian Newspaper Co Ltd v Bennett* [1894] AC 284 diikut dan *Sandison v Malayan Times Ltd & Ors* [1964] 30 MLJ 332 dibeza.

(2) Tujuan pembelaan perlindungan bersyarat adalah untuk menghalang liabiliti daripada timbul untuk pernyataan tidak benar yang mungkin telah dibuat semasa kejadian-kejadian yang dilindungi; pembelaan justifikasi telahpun melindungi pernyataan-pernyataan yang benar. Untuk menggunakan pembelaan perlindungan bersyarat, defendan-defendan mestilah di bawah satu kewajipan untuk bersuara dan pihak awam mempunyai kepentingan yang sama untuk mendengar apa yang diperkatakan. Saksi-saksi plaintif semuanya mengaku dalam keterangan mereka bahawa apa yang diperkatakan adalah perkara-perkara yang mempunyai kepentingan awam. Dalam apa keadaan, ini dengan jelas satu kes di mana ujian mengikut keadaan sememangnya boleh terpakai (lihat ms 365I–366A, F–G); *Reynolds v Times Newspapers Ltd* [1998] 3 WLR 863 diikut.

(3) Setelah pembelaan ini dibuat, ia boleh dikalahkan hanya dengan bukti niat jahat nyata menurut A 78 k 3(3) Kaedah-Kaedah Mahakmah Tinggi 1980. Niat jahat nyata mestilah diplikan dalam bentuk jawapan dan butiran-butiran tersebut mestilah dinyatakan. Malangnya, tiada jawapan telah difailkan oleh plaintif maupun terdapat dakwaan niat jahat nyata. Dalan apa-apa keadaan, tiada keterangan telah dikemukakan oleh plaintif tentang niat jahat nyata. Rujukan dalam perengaan 8 penyataan tuntutan terpinda terhadap perkataan-perkataan bahawa defendan-defendan telah menerbitkan perkataan-perkataan yang

'salah dan berniat jahat' bukan satu pli niat jahat nyata. Oleh itu, perkataan-perkataan yang 'salah dan berniat jahat' sebagaimana yang diplikan, tidak membentuk satu pli niat jahat nyata untuk menyangkal pembelaan perlindungan bersyarat (lihat ms 366G–H, 367A–C).]

Notes

For cases on defamation generally, see 12 *Mallal's Digest* (4th Ed, 2000 Reissue) paras 193–409.

Cases referred to

A Balakrishnan & Ors v Nirumalan K Pillay & Ors [1999] 3 SLR 22 (refd)
Australian Newspaper Co Ltd v Bennett [1894] AC 284 (folld)
Dato' Seri Anwar bin Ibrahim v Dato' Seri Dr Mahathir bin Mohamad [1999] 4 MLJ 58 (refd)
Dato' Seri Anwar bin Ibrahim v Dato' Seri Dr Mahathir bin Mohamad [2001] 1 MLJ 305 (refd)
Dato' Seri Anwar bin Ibrahim v Dato' Seri Dr Mahathir bin Mohamad [2001] 2 MLJ 65 (refd)
Hough v London Express Newspaper Ltd [1940] 2 KB 507 (refd)
Institute of Commercial Management United Kingdom v New Straits Times Press (M) Bhd [1993] 1 MLJ 408 (refd)
Jones v Skelton [1963] 3 All ER 952 (refd)
Knupffer v London Express Newspaper Ltd [1944] AC 116 (folld)
Lee Kuan Yew v Davies & Ors [1989] SLR 1063 (refd)
Morgan v Odhams Press Ltd & Anor [1971] 2 All ER 1156 (folld)
Murugason v The Straits Times Press (1975) Ltd [1984–1985] SLR 334 (refd)
Reynolds v Times Newspapers Ltd [1998] 3 WLR 863 (folld)
Rubber Improvement Ltd & Anor v Daily Telegraph Ltd [1964] AC 234 (refd)
Sandison v Malayan Times Ltd & Ors [1964] MLJ 332 (distd)

Legislation referred to

Rules of the High Court 1980 O 78 r 3(3)

Mohamed Hanipa bin Maidin (*Mohamed Hanipa & Associates)* for the plaintiff.

PH Looi (*Zaid Ibrahim & Co*) for the defendants.

Kamalanathan Ratnam J:

Facts

The plaintiff was at the material time the Secretary General of the Islamic Party of Malaysia ('PAS'). He was also the permit holder of a PAS's

newspaper known as *Harakah*. He was and is still a member of the board of directors of *Harakah*. Since 1994, the permit of *Harakah* had been issued under his name. The permit is issued annually by the Home Ministry ('KDN') upon an application being made. The first defendant is a private broadcasting station popularly known as TV3. The second defendant was the operations manager of TV3. The third defendant was the producer of the news bulletin aired on 18 July 1997, also known as *Buletin Utama*. The said programme is a daily news bulletin aired at prime time, that is, between 8pm to 9pm.

The publication

On 18 August 1997 at about 8pm, during the said programme, the defendants broadcast or caused to be broadcast and published the following:

> Intro
>
> Dalam pada itu, pucuk pimpinan UMNO mengarahkan Biro Agama dan Penerangan berkempen bagi menjawab tuduhan berkenaan demi perpaduan umat Islam di negara ini.
>
> Ia berikutan tuduhan murtad terhadap Datuk Seri Dr Mahathir Mohamad disifat bertujuan melemah dan mengancam perpaduan umat Islam yang sekaligus menguntungkan musuh.
>
> Voice Over
>
> Menteri di Jabatan Perdana Menteri, Datuk Dr Hamid Othman berkata Presiden Parti Datuk Seri Dr Mahathir Mohamad mengarahkan beliau menjawab tuduhan itu.
>
> Beliau mengakui tuduhan sedemikian sedikit sebanyak akan mempengaruhi ahli UMNO terutama di kawasan pedalaman.
>
> Sehubungan itu, selain menumpukan perhatian kepada orang ramai, Biro Agama juga katanya akan meyakinkan ahlinya.
>
> SOT IN: Datuk Dr Hamid Othman
>
> Penerangan yang jelas mengenai politik dan hubungannya dengan akidah itu satu, yang kedua ialah tentang perjuangan kita membina umah ini ialah dua aspek akidah dan aspek pencapaian hidup ini, khazanah di dunia ini, khazanah di akhirat ini, dua perkara ini mesti diterangkan.
>
> SOT OUT:
>
> Mengenai tabloid *Harakah* yang menyiarkan rencana mendakwa Perdana Menteri murtad, Pusat Islam katanya akan mencadangkan kepada Kementerian Dalam Negeri untuk mengkaji semula permit akhbar itu.
>
> Dalam perkembangan sama, Menteri Besar Kedah, Tan Sri Sanusi Junid berkata tuduhan sedemikian mampu memecahbelahkan umat Islam.
>
> Mereka yang iri hati dengan kejayaan Malaysia pasti bergembira sedangkan Perdana Menteri disifatkan sebagai pemimpin umat Islam bertaraf dunia.
>
> Sehubungan itu, UMNO Kedah akan menentang tuduhan itu habis-habisan.

SOT IN: Tan Sri Sanusi Junid

Saya challenge mari ke Kedah, kata kat Dr Mahathir yang bukan-bukan. Saya challenge suruh mai, nak tengok mandi darah ke tak, sila datang ke Kedah dan cerca Dr Mahathir, saya akan gerakkan seluruh barisan pemuda, orang tua untuk menentang sehabis-habisan, jangan eklah, bab bergaduh ni saya ada pengalaman.

SOT OUT:

The claim

By the amended statement of claim, the plaintiff claims that the defendants falsely and maliciously broadcast or caused to be broadcast of and concerning him as the then secretary general of PAS and the permit holder of *Harakah*, the words complained of in the said *Buletin Utama* which were defamatory of him, and that the words viewed in the context of the said telecast were understood to refer to him.

The plaintiff, thus, claims damages in the sum of RM20m against each of the defendants with interest and costs and a further order to direct the defendants to tender their apologies by broadcasting the same in the *Buletin Utama* for three days consecutively.

By their defence, the defendants deny that the words in the said *Buletin Utama* either referred to the plaintiff or bore the meanings respectively as alleged by the plaintiff. In the alternative, the defendants raised the defences of justification and fair comment. The defence of fair comment was later dropped. In addition, and as a further alternative, they raised the defence of qualified privilege.

Findings of the court

Who is the plaintiff?

The plaintiff who was at all material times the secretary general of PAS and the permit holder of *Harakah* claims to have been personally defamed by the said words. It is obvious from the pleadings that the plaintiff has not made this claim for and on behalf of PAS. The translated version of para 8 of the amended statement of claim reads as follows:

> In the said programme of *Buletin Utama*, the first defendant with the intention and also falsely and maliciously broadcast or caused to be broadcast and published libellous news which is not true against the plaintiff as the Secretary General of PAS and the permit holder of the newspaper *Harakah* by using the following words …

It is clear from this paragraph that it is the plaintiff who claims to have been defamed. The reference to the fact that he was secretary general of PAS and the permit holder of *Harakah* merely serves to explain why he claims to have been defamed and to determine the proper quantum of damages that he claims to be entitled to.The personal nature of the claim is emphasized in para 9 of the amended statement of claim which reads as follows:

> The words mentioned above directly or indirectly refer to the plaintiff or will be understood to be referring to the plaintiff …

The paragraph then goes on to set out particulars of how it is claimed the words refer to or are to be understood as referring to the plaintiff. There is no suggestion that the words are to be understood as referring to PAS. Paragraph 10 of the amended statement of claim follows up on this. It sets out the five contentions representing the natural and ordinary meaning of the words. All five grounds refer exclusively to the plaintiff. From these pleaded facts, it is a clear admission of the plaintiff that the natural and ordinary meaning of the words show an intention to defame him personally and not PAS. If any doubt remained of the personal nature of this action, para 11 of the amended statement of claim removes it. Here, the plaintiff contends that he, not PAS:

> … has suffered great humiliation and suffering as regards credit, character and reputation which have caused the plaintiff to be humiliated, despised, to be disobeyed openly, ridiculed and looked down in the eyes of society.

Even when seeking remedies, the plaintiff wanted a personal apology.

Are the words complained of defamatory?

This action is based on the plain and ordinary meaning of the words in that the plaintiff, under cover of his office as secretary general of PAS and permit holder of *Harakah*:

(a) has alleged that the Prime Minister has committed apostasy;

(b) is a tool to divide the Muslim community in Malaysia;

(c) has defamed the Prime Minister;

(d) has published false and libellous news; and

(e) has vengeful, hateful and jealous feelings towards the Prime Minister.

Paragraph 10 of the amended statement of claim does not allege that the words defame PAS. On the contrary, it is the plaintiff's allegation that the plain and ordinary meaning of the words is that they defame him.

In *Jones v Skelton* [1963] 3 All ER 952, the Privy Council said at p 958 as follows:

> The ordinary and natural meaning of words may be either the literal meaning or it may be an implied or inferred or an indirect meaning: any meaning that does not require the support of extrinsic facts passing beyond general knowledge but is a meaning which is capable of being detected in the language used can be a part of the ordinary and natural meaning of words.

This view was accepted and adopted by LP Thean JA in *A Balakrishnan & Ors v Nirumalan K Pillay & Ors* [1999] 3 SLR 22. In short, what these authorities suggest is that the plain and ordinary meaning of words necessarily excludes the knowledge of extraneous circumstances. Again, in *Rubber Improvement Ltd & Anor v Daily Telegraph Ltd* [1964] AC 234, Lord Reid explained at p 258 that:

> What the ordinary man would infer without special knowledge has generally been called the natural and ordinary meaning of the words. But that expression is rather misleading in that it conceals the fact that there are two elements in it. Sometimes it is not necessary to go beyond the words themselves, as where the plaintiff has been called a thief or a murderer. But more often the sting is not so much in the words themselves as in what the ordinary man will infer from them, and that is also regarded as part of their natural and ordinary meaning.

In that case, two national newspapers published in their front pages, paragraphs headed respectively '*Inquiry on Firm by City Police*' and '*Fraud Squad Probe Firm*', which stated in substance that the police were inquiring into the affairs of a limited company of which one JL was chairman. After issuing a statement denying that such inquiry was being made, he and the company sued the owners of both the newspapers. The statement of claim alleged that the words were defamatory in their ordinary and natural meaning in that the words meant and were understood to mean that the plaintiffs had been guilty of or were suspected by the police of being guilty of fraud or dishonesty. The defendants denied that the words meant or were capable of meaning that the plaintiffs were guilty of or suspected of fraud. Lord Reid explained that in the narrow interpretation of the natural and ordinary meaning of the words, there was no defamation as a statistician or other expert might be conducting the inquiry. However, it was possible that some readers of the words may conclude that the inquiry was by the fraud squad; hence the defamation. This is the extended natural and ordinary meaning. The extended meaning of the plain and ordinary meaning to be given to words therefore allow for some latitude on the interpretation that can be made by the public on the words used. Lord Reid again explained thus at p 258:

> The gist of the two paragraphs is that the police, the City Fraud Squad, were inquiring into the appellants' affairs. There is no doubt that in actions for libel the question is what the words would convey to the ordinary man: it is not one of construction in the legal sense. The ordinary man does not live in an ivory tower and he is not inhibited by a knowledge of the rules of construction. So he can and does read between the lines in the light of his general knowledge and experience of worldly affairs.

But as explained further by his Lordship at the same page, even this extended meaning however has nothing to do with instances where special knowledge is relied on. This is what he said:

> … I leave aside questions of innuendo where the reader has some special knowledge which might lead him to attribute a meaning to the words not apparent to those who do not have that knowledge.

Having dealt with the law, I shall now look at the case of the plaintiff. Clearly, the plaintiff's action presumes the existence of special knowledge which is not, however, part of his pleaded case. It is trite law that a party must plead relevant issues it intends to rely on. The plaintiff appears to accept that the words only defame him if they are so understood by persons with special knowledge of extrinsic facts. The plaintiff relied on the evidence

given by PW2, the managing director of *Harakah*, and PW4, the group editor of *Harakah*, and contended that these two witnesses being acquainted with the plaintiff 'also possessed knowledge of the extrinsic facts'. In fact, the plaintiff's submission is centred round the existence of extrinsic facts.

It was a specific allegation by the plaintiff that he was accused of alleging that the Prime Minister had committed 'murtad' (apostasy). It is contended by the plaintiff that the words attributed to the defendants state that *Harakah* had published an article alleging that the Prime Minister had committed apostasy. Whether or not *Harakah* published such an article, attributing such an article to the defendants cannot per se defame *Harakah* or those responsible for its publication. If at all, it would be defamatory of the Prime Minister. It is obvious, therefore, that in order to present a respectable case for defamation, the plaintiff had to rely on extraneous facts. But these extraneous facts have to be first alleged and then proved. The plaintiff has done neither. No doubt the plaintiff had agreed in his evidence that the Prime Minister has not committed apostasy, how far does this assist the plaintiff personally? The natural and ordinary meaning of the words must either defame the Prime Minister or *Harakah*.

Do the words complained of refer to the plaintiff?

The words complained of do not expressly refer to the plaintiff; yet it is the law that the burden remains on the plaintiff to show that they refer to him (see *Lee Kuan Yew v Davies & Ors* [1989] SLR 1063 and *Institute of Commercial Management United Kingdom v New Straits Times Press (M) Bhd* [1993] 1 MLJ 408). It is for the plaintiff to establish objectively that he was the person to be identified by the words used. In fact, even his own witness, PW2, claimed under cross-examination that the publication of the words 'had caused a substantial ruin towards PAS and the Muslims, and TV3, I cannot forgive'. Whilst his focus was on PAS and the Muslims, in general, PW2 totally failed to state and conspicuously omitted to relate that the words as understood by him specifically referred to the plaintiff. Looking at the plaintiff's own evidence, it is relevant to relate portions of his testimony relevant to this issue:

> Q: Adakah anda menyatakan laporan itu merupakan fitnah?
> A: Ya.
> Q: Adakah berita sebut apa-apa mengenai permit akhbar?
> A: Ada.
> Q: Apabila berita sebut permit adakah itu boleh merujuk kepada anda?
> A: Ya.

To my mind, the words 'boleh merujuk kepada anda?' means '*could* (the permit) refer to you?' (Emphasis added.) The use of the words 'boleh merujuk kepada anda?' implies that even the plaintiff is not absolutely certain of his stand. Surely, if the plaintiff was of the view that being the permit holder, the words in fact did refer to him, the question should have been, 'Apabila berita sebut permit, adakah itu merujuk kepada anda?'. The

omission of the word 'boleh' connotes certainty and avoids ambivalence. Besides, this evidence was led during the examination in chief.

In *Morgan v Odhams Press Ltd & Anor* [1971] 2 All ER 1156, Lord Guest, whilst relating to the question of identity, said at p 1176 in the House of Lords as follows:

> … But here the question is not whether the words are defamatory. It is conceded that they are, if they refer to the plaintiff. The question is one purely of identity. 'Are the words capable of being understood to refer to the plaintiff?' In my view, a somewhat more exacting test should be predicated where the question is one of identity. It is not sufficient for the reader to say 'I wonder if the article refers to Johnny Morgan' nor is pure speculation sufficient. Nor is it sufficient that a reasonable person believes that the words refer to the plaintiff. The test is an objective one. The ordinary reader must be fair-minded and not avid for scandal. He must not be unduly suspicious. The ordinary reader must have rational grounds for his belief that the words refer to the plaintiff.

Applying this test, I find that the plaintiff has failed to identify himself as the person concerned, as his case is based on no more than the spectre of a mere possibility raised in answer to what I will find as a leading question. No evidence has been adduced that any reasonable person other than interested witnesses of the plaintiff himself on watching the show and hearing the words broadcast would, on rational grounds, have identified the said words with the plaintiff. I conclude that the plaintiff has fallen far short of the test formulated by the House of Lords in the case of *Knupffer v London Express Newspaper Ltd* [1944] AC 116 at p 119. It is this:

> … Where the plaintiff is not named, the test which decides whether the words used refer to him is the question whether the words are such as would reasonably lead persons acquainted with the plaintiff to believe that he was the person referred to.

The plaintiff's case, that as he was the permit holder of *Harakah*, that itself conferred on him the automatic right to claim to have been defamed by any defamation directed at the said publication, has, in my view, no support both in law and in logic. In *Australian Newspaper Co Ltd v Bennett* [1894] AC 284, the Privy Council made it very clear that defamatory comments directed at a newspaper cannot be taken as directed at all persons connected with it. And in that case, the plaintiff failed, despite being the part-proprietor, manager and conductor of the newspaper. What was crucial was that he was not the editor. He did not have any control over its contents. Significantly in the case before me, the plaintiff admitted under cross-examination that it is the editor and not he, who is responsible for the contents of *Harakah*. In his evidence, the plaintiff did not even suggest that he had any control over its contents. In any case, there is no allegation of an innuendo in the case before me. The plaintiff seeks a determination by this court that he personally has been defamed from no more than an allegation that defamatory words were published in *Harakah*. How the transition is made from comments made against *Harakah*, to comments made against him personally, remains unstated. The plaintiff relies on *Sandison v*

Malayan Times Ltd & Ors [1964] MLJ 332. In my view, this case does not support the plaintiff. There, a newspaper article reported that a 'Senior Expatriate Officer in the Rubber Replanting Board' was dismissed. The said officer was not named. The court did not have any difficulty in finding that the article, nonetheless, referred to the plaintiff. Ong J (as the Chief Justice then was) said at p 333 as follows:

> … As to identification of the plaintiff being the person referred to, I do not think it can be seriously suggested that he was not clearly pin-pointed in the article so as to be instantly recognisable by all those readers of the newspaper who happened to know him, The cap of a 'Senior Expatriate Officer in the Rubber Replanting Board' fitted him but no other person. The task of identification was in fact absurdly simple; …

Even on the basis of *Sandison*, it is clear that a reference to *Harakah* is not a reference to someone as remote as its permit holder.

The plaintiff contends that he has established that he is identified by the broadcast through witnesses he had called, namely, PW2 and PW4. He argues that on this basis, he has shown that the telecast refers to him. I disagree. The only relevance of the evidence adduced is to show that some people knew that the plaintiff was the permit holder of *Harakah*. This is irrelevant. The real question is whether a reasonable viewer of the telecast would have concluded that it defamed the permit holder of *Harakah*. Only if it did, would the evidence that some people knew that the plaintiff was the permit holder be relevant. It is my judgment that as a matter of law, the reasonable viewer would not have identified the reference to *Harakah* in the telecast with its permit holder. Such an association would not be reasonable.

In *Hough v London Express Newspaper Ltd* [1940] 2 KB 507, cited with approval in *Murugason v The Straits Times Press (1975) Ltd* [1984–1985] SLR 334, the court explained the point this way at p 337:

> … It is not proof of a special fact in this sense merely to call a number of people to say that they understood the words in a defamatory sense; they would have to prove some fact known to them which would be sufficient to entitle any reasonable man with such knowledge to interpret the words in a defamatory sense.

Whether a reasonable man would associate the contents of *Harakah* with its permit holder is a matter of law and not evidence. The same point is made by Viscount Simon in the following passage of *Knupffer v London Express Newspaper Ltd* at p 121. It reads as follows:

> … Witnesses called for the appellant were asked the carefully framed question: 'To whom did your mind go when you read that article?' and they not unnaturally replied by pointing to the appellant himself, but that is because they happened to know the appellant as the leading member of the society in this country and not because there is anything in the article itself which ought to suggest even to his friends that he is referred to as an individual.
>
> There are two questions involved in the attempt to identify the appellant as the person defamed. The first question is a question of law — can the article, having regard to its language, be regarded as capable as referring to the

> appellant? The second question is a question of fact — Does the article, in fact, lead reasonable people, who know the appellant, to the conclusion that it does refer to him? Unless the first question can be answered in favour of the appellant, the second question does not arise, and where the trial judge went wrong was in treating evidence to support the identification in fact as governing the matter, when the first question is necessarily, as a matter of law, to be answered in the negative.

Is Harakah a class of its own?

The plaintiff suggests that *Harakah* is a class, and that he is a member of that class. I cannot accept this argument. A newspaper is decidedly not a class. It is my judgment that the persons prima facie liable for defamation in a publication are the writer, editor, proprietor and printer. The permit holder is not a person who is naturally considered liable for the contents of a newspaper. In the same way, a permit holder per se cannot, therefore, recover for defamation in a newspaper. I hasten to add that if he is in fact found to have control over its contents, he may be liable. This, no doubt, is a question of fact to be determined based on each case. For a permit holder to recover in a defamation action it is not sufficient that he merely holds that office. He must show that he is the person that a reasonable person would associate as having such control. This again is a question of fact. These facts ought therefore to be proved in the normal way, by showing that the permit holder is referred to and is otherwise identified by the defamatory words. In the present case, the plaintiff has not alleged that he exercised any control over *Harakah*. On the contrary, his evidence is that he was the permit holder on an ex officio basis by reason of being the then secretary general of PAS. He has also not shown that he has been referred to or is otherwise identified by the words used.

Justification

The substance of the plaintiff's complaint is that *Harakah* has been wrongly accused of labelling the Prime Minister 'murtad' and that therefore he, the plaintiff, has been defamed. If the defendants are able to show that *Harakah* had indeed substantially made such similar allegations, then the defence of justification would well and truly be borne out. This issue of the Prime Minister being 'murtad' had its origin after the arrest of three Muslim girls who participated in a beauty contest on 15 June 1997 in Petaling Jaya. Their arrests were initiated and indeed carried out by the Jabatan Agama Islam Selangor ('JAIS'). This provoked a chorus of criticism by government leaders led by the then Deputy Prime Minister. It is not in dispute that *Harakah* joined the bandwagon and criticized the government and stoically defended JAIS's conduct. In its issue of 18 July 1997, *Harakah* carried in banner-blazing headlines the words '*Tangkap dan hukum peserta ratu cantik — PAS Pertahan JAIS*'. Further, in its issue dated 11 August 1997, *Harakah* reported what the Mufti of Selangor, Dato' Ishak Baharom, is reported to have stated. The same reads as follows:

> ALOR SETAR: Mufti Selangor, Datuk Ishak Baharom berkata ramai pemimpin kerajaan sekarang yang tidak berfikir dahulu sebelum

A mengeluarkan sebarang kenyataan yang boleh menyebabkan syahadah mereka tergelincir.

Murtad hukumnya kepada sesiapa sahaja yang mempertikaikan syarat Islam misalnya hukum Hudud seperti yang hendak dilaksanakan oleh sebuah negeri.

…

B Dato' Seri Utama Diraja, Dato' Ishak berkata, mereka seringkali mengulangi kesalahan serupa apabila menjelang setiap kali pilihan raya.

'Sudah tahu sikap dan perangai kerajaan yang ada, mengapa masih memangkah dan memberikan undi kepada mereka.

Translated it reads as follows:

C … a lot of government leaders now do not think before they issue any statement which can cause them to divert from their set of beliefs.

Apostasy is the sentence to anyone disputing the Islamic principles such as Hudud laws which are to be implemented in a country.

… they repeatedly commit the same sin where there is an election.

D As the mentality and character of the government is known, why cross and vote for them.

Further, in *The New Straits Times* of 15 August 1997, the Prime Minister is reported to have said:

E Dr Mahathir said certain mufti had labelled him as 'near apostate' because he did not agree with the arrests by religious enforcement officers of three beauty contestants.

Again in *The New Straits Times* of 18 August 1997, the Prime Minister is reported to have said as follows:

F He [the Prime Minister] also reminded members [of UMNO] of the danger of slandering, citing as an example a recent report in the *Harakah* newspaper which claimed that he (Dr Mahathir) was close to being an apostate over the issue of three women who were arrested for taking part in a beauty contest.

'What right has it to say that I am nearly an apostate? But the slander was hurled, the accusation made and for those who do not check (the facts), they may accept it (as true). In UMNO, we do not want to slander or resort to any means that does not bring progress,' he said.

G

With this virtual accusation against *Harakah* by none other than the person himself who is alleged to be 'murtad', I was at a loss to understand why the plaintiff did not put to rest this aspect of the accusation against *Harakah* by the Prime Minister himself. With the plaintiff accepting what was said by the Prime Minister in the numerous reported newspaper publications, it is clear to my mind that it was fair and reasonable for the defendants to have relied on the defence of justification. The reasonableness of this conclusion can be seen from the fact that the Prime Minister himself took this view.

H

I Qualified privilege

The purpose of the defence of qualified privilege is to prevent liability from arising for untrue statements that may have been made on protected

occasions, since the defence of justification already protects true statements. In *Dato' Seri Anwar bin Ibrahim v Dato' Seri Dr Mahathir bin Mohamad* [1999] 4 MLJ 58, I had fully canvassed the law relating to this defence. The appeal against this decision was dismissed by the Court of Appeal (see *Dato' Seri Anwar bin Ibrahim v Dato' Seri Dr Mahathir bin Mohamad* [2001] 1 MLJ 305). Leave to appeal to the Federal Court was also refused (see [2001] 2 MLJ 65).

It is clear, therefore, that our highest court has accepted, following *Reynolds v Times Newspapers Ltd* [1998] 3 WLR 863, the test for determining privileged occasions as being crystallized into three specific questions:

(1) Was the publisher under a legal, moral or social duty to those to whom the material was published (which in appropriate cases, as noted above, may be the general public) to publish the material in question? (We call this the duty test.)

(2) Did those to whom the material was published (which again in appropriate cases may be the general public) have an interest to receive that material? (We call this the interest test.)

(3) Were the nature, status and source of the material, and the circumstances of the publication, such that the publication should in the public interest be protected in the absence of proof of express malice? (We call this the circumstantial test.)

To my mind, this is as clear a case as any that answers all three questions with a firm affirmative. The first defendant, in any case, is a television station whose avowed aim is to carry current news and in particular local news. A report on the status of Hudud laws in Malaysia, and Muslim law generally, in cosmopolitan Malaysia is one to stir the interest of any dedicated enquirer. It certainly answers the need to satiate public interest. In like manner, the status of the Prime Minister, in the eyes of the general public and more so amongst his Muslim brethren, is a matter of extreme public interest. It is my judgment, therefore, that the defendants were under a duty to speak and the public under a corresponding interest to hear what was said. To this end, I must record the admission of even the plaintiff's witnesses who all admitted in their evidence that what was said were matters of public interest. In any case, this is clearly a case where the circumstantial test can well apply.

Once this defence is made out, it can be defeated only by proof of express malice. The Rules of the High Court 1980 ('the RHC') is explicit as to how a case of express malice is to be made out. Order 78 r 3(3) of the RHC reads as follows:

> (3) Where in an action for libel or slander the plaintiff alleges that the defendant maliciously published the words or matters complained of, he need not in his statement of claim give particulars of the facts on which he relies in support of the allegation of malice, but if the defendant pleads that any of those words or matters are fair comment on a matter of public interest or were published upon a privileged occasion and the plaintiff

> intends to allege that the defendant was actuated by express malice, he must serve a reply giving particulars of the facts and matters from which the malice is to be inferred.

It is obvious, therefore, that express malice must be pleaded in a reply and that particulars must be set out. Unfortunately, there is no reply filed by the plaintiff nor are there allegations of express malice. In any case, no evidence was even presented by the plaintiff on express malice. It is my judgment that the reference in para 8 of the amended statement of claim to the words that the defendants published the words 'falsely and maliciously' is not a plea of express malice. Such allegations are meant to make out the plaintiff's case. I hold that such words 'falsely and maliciously' as pleaded, do not make out a plea of express malice to negate the defence of qualified privilege. I gain support for this view from *Atkins' Court Forms* (2nd Ed) Vol 25, wherein the learned editors explain the law in this way at p 61:

> … The law presumes that defamatory words are false unless and until the defendant pleads and proves justification. 'Maliciously' means with conscious intention (*Clark v Molyneux* (1877) 3 QBD 237 at p 247, CA per Brett LJ), and must be distinguished from malice (ie 'actual' or 'express' malice), which rebuts a defence of fair comment or qualified privilege …

The plaintiff submitted that in broadcasting the libellous words without taking any precaution to ascertain if such words were true, the defendants were reckless and were not concerned with the truth or falsity of the words, thereby evidencing malice. On this issue, I must also consider the fact that the defendants were entitled to rely on the statements by the Prime Minister himself which were quoted in the various newspapers with reference to the accusation that he was 'murtad' and his numerous rebuttals and challenges. I accept the fact that based on such denials and expressions of exasperation by the Prime Minister on such allegations, the defendants were entitled to rely on such statements which clearly would negate any element of malice, express or implied.

Having considered all matters, it is my judgment that this claim against all the defendants must be dismissed with costs.

Claim dismissed with costs.

Reported by Ezatul Zuria Azhari